**IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA**

**2012 MTWCC 30**

**WCC No. 2012-2935**

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**KRIS KELLER**

**Petitioner**

**vs.**

**MONTANA UNIVERSITY SYSTEM**
**SELF FUNDED WORKERS' COMPENSATION PROGRAM**

**Respondent/Insurer.**

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ORDER DENYING RESPONDENT'S MOTION
FOR JUDGMENT ON THE PLEADINGS

**Summary:** Respondent moved for judgment on the pleadings, arguing that the Petition alleges Petitioner suffered an injury during treatment, precluding Respondent's liability for her injury pursuant to § 39-71-704(1)(d)(iii), MCA.

**Held:** Respondent's motion is denied. The party moving for judgment on the pleadings must establish that no material issue of fact remains and that the movant is entitled to judgment as a matter of law. Construing the facts alleged in the Petition in a light most favorable to the Petitioner, the Respondent has failed to show that the Petition alleges that an "accident" occurred while Petitioner was being treated for her occupational disease, precluding Respondent's entitlement to judgment as a matter of law.

¶ 1 Respondent Montana University System Self-Funded Workers' Compensation Program (MUS) moves this Court for judgment on the pleadings, contending that the allegations in the Petition are that Petitioner Kris Keller suffered an injury while being treated for an occupational disease, and that MUS has no liability for a condition or injury resulting from treatment pursuant to § 39-71-704(1)(d)(iii), MCA.[1] Keller opposes Respondent's motion, contending that her current shoulder condition "stems from

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[1] Respondent's Motion for Judgment on the Pleadings (Motion) at 2, Docket Item No. 5.

ASTYM treatment" and that "injury arising from treatment required by workplace should be considered in the same fashion as injury arising from duties required at workplace."[2]

¶ 2 After the motion was fully briefed, the Court convened a telephone conference hearing on July 26, 2012. Keller represented herself at the hearing. Steven W. Jennings represented MUS.

## Facts Alleged

¶ 3 On May 1, 2012, Keller, appearing *pro se*, filed a handwritten Petition for Hearing (Injury) with the Court.[3] The Petition alleges that on January 27, 2010, Keller suffered a "treatment injury" when "occupational therapist treated patient for elbow tendonitis using a tool called an ASTYM on the shoulder region, causing trauma and injury to the right shoulder and other body parts."[4]

¶ 4 The Petition was written on a pre-printed form available to *pro se* litigants. Listed as a potential witness was an individual named Judy Bolewicz, with Freestone Rehab., who "can describe the tool and the appropriateness of treatment."[5]

## Discussion

¶ 5 A party moving for judgment on the pleadings must establish that on the face of the petition "no material issue of fact remains and that the movant is entitled to judgment as a matter of law."[6]

¶ 6 When a motion is for judgment on the pleadings, the allegations of the petitioner are deemed true for purposes of the petition and construed in a light most favorable to the petitioner.[7]

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[2] Response to Response to Petition and Motion for Judgment on the Pleadings (Petitioner's Response) at 2, Docket Item No. 6.

[3] Docket Item No. 1.

[4] Petition for Hearing at 1, ¶ 1.

[5] *Id.* at 2, ¶ 6.

[6] *Lanz v. Liberty Northwest Ins. Corp.*, 2005 MTWCC 22, ¶ 6, *citing Paulson v. Flathead Conservation Dist.,* 2004 MT 136, ¶ 17, 321 Mont. 364, 91 P.3d. 569.

[7] *Id.*, ¶ 3, 2004 MT 136, ¶ 17.

¶ 7 MUS premises its motion on Keller's contention that she incurred an injury while undergoing treatment for an occupational disease.[8] MUS argues that it is absolved of liability for the injury pursuant to § 39-71-704(1)(d)(iii), MCA. That section states:

> An insurer is not liable for injuries or conditions ***that result from an accident*** that occurs during travel or treatment, except that the insurer retains liability for the compensable injuries and conditions for which the travel and treatment were required. (Emphasis added.)

¶ 8 In occupational disease (OD) cases, the applicable statutes are either those in effect on the claimant's last date of employment,[9] or if the claimant continues to work, those in effect at the time the OD claim was filed.[10]

¶ 9 Since its enactment in 2001, § 39-71-704(1)(d)(iii), MCA, has remained unchanged. However, it is not readily apparent from the pleadings which statutory year applies to Keller's OD claim. If Keller's OD claim occurred on or after October 1, 2001, then § 39-71-704(1)(d)(iii), MCA, is applicable here. If Keller's claim pre-dates October 1, 2001, then it pre-dates the effective date of the statute.

¶ 10 Assuming § 39-71-704(1)(d)(iii), MCA, applies to Keller's claim, I then look to the four corners of the Petition and construe it in a light most favorable to Keller.

¶ 11 Keller's Petition alleges an injury from "mandatory"[11] treatment, yet nowhere is there any reference to "an accident" as required by § 39-71-704(1)(d)(iii), MCA. Indeed, Keller takes no issue with the treatment she received from the therapist, even listing the therapist as a witness who could describe the ASTYM tool and the "appropriate" nature of the treatment rendered.

¶ 12 An accident is defined in § 39-71-119(2), MCA as:

> (a) an unexpected traumatic incident or unusual strain;
> (b) identifiable by time and place of occurrence;
> (c) identifiable by member or part of the body affected; and
> (d) caused by a specific event on a single day or during a single work shift.

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[8] Petition for Hearing at 1, ¶ 3.

[9] *Grenz v. Fire and Cas.of Connecticut, 278 Mont. 268,* 924 P.2d 264 (1996).

[10] *Bouldin v. Liberty Northwest Ins. Corp.*, 1997 MTWCC 8; *Chapman v. Twin City Fire Ins. Co.*, 2010 MTWCC 36, ¶ 33.

[11] Petition for Hearing at 1, ¶¶ 1, 3.

¶ 13 For § 39-71-704(1)(d)(iii), MCA, to relieve MUS of liability, MUS must show that Keller's injury or condition "result[ed] from an accident that occur[red] during . . . treatment." Nothing in the Petition allows me to construe Keller's ASTYM treatment as meeting the definition of "accident" as set forth in § 39-71-119, MCA.[12]

¶ 14 In a motion for judgment on the pleadings, the moving party "must establish that no material issue of fact exists and that it is entitled to judgment as a matter of law.[13] Because the material issue of whether customary ASTYM treatment can rise to the level of an accident remains, Respondent's motion is denied.

ORDER

¶ 15 Respondent's motion for judgment on the pleadings is **DENIED**.

DATED in Helena, Montana, this 8th day of August, 2012.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: Kris Keller
Steven W. Jennings
Submitted: June 18, 2012

[12] Motion at 3; Reply Brief at 2, Docket Item No. 7.

[13] *Ritter v. Bill Barrett Corp.*, 2009 MT 2010, ¶ 10, 351 Mont. 278, 210 P.3d 688.